UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT LICENSE NO. 08056
Issued to: Charles P. Strohecker

DECISION OF THE COMMANDANT ON APPEAL FROM DENIAL OF APPLICATION FOR ATTORNEY'S FEES AND EXPENSES
UNITED STATES COAST GUARD

2300

Charles P. Strohecker

This appeal has been taken in accordance with 5 U.S.C. 504 and 49 CFR Part 6.

By order dated 30 June 1982, an Administrative Law Judge of the United States Coast Guard at Norfolk, Virginia denied Appellant's application for attorney's fees and expenses incurred as a result of defending himself against a charge of negligence brought by the Coast Guard against his Operator's license. Three specifications supporting the charge were raised by the Coast Guard. They alleged that, while serving as Operator aboard Tug MARIE SWANN, O.N. 253463 under authority of the license above captioned, on or about 0550, 30 March 1982, in the James River at or near the City of Newport News in the State of Virginia, Appellant: (1) negligently failed to navigate said vessel in such a manner as to preclude the barge said vessel was towing, tank barge SWANN NO. 17, from alliding with M/V CENTAURO, thereby damaging said tank barge; (2) negligently navigated said vessel in such a manner as to endanger the life, limb or property of other persons, to wit, failing to maintain adequate communications with said vessel's line handlers, thereby contributing to the loss of control over the barge said vessel was towing, tank barge SWANN NO. 17, and the allision of said barge with M/V CENTAURO; (3) negligently navigated said vessel in such a manner as to endanger the life, limb or property of other persons, to wit; failing to connect the towing hawser before releasing the breast lines, thereby contributing to the barge said vessel was towing, SWANN NO. 17, being set adrift and alliding with the M/V CENTAURO.

The hearing was held at Norfolk, Virginia on 20 April 1982.

After the presentation of Appellant's defense, the Administrative Law Judge rendered an order in which he dismissed the charge and specifications.

The written decision was served on 4 June 1982.

Appellant made timely application to the Administrative Law

Judge for attorney's fees and expenses related to the R.S. 4450 proceeding pursuant to the Equal Access to Justice Act [EAJA]; Pub. L. 96-481, 94 Stat. 2325, 5 U.S.C. 504; and the regulations implementing EAJA for the Department of Transportation at 49 CFR Part 6, Fed. Reg. Vol. 46, No. 195, pp 49878, Oct 8, 1981. The Coast Guard filed an answer which sought to established substantial justification for preferring the charges and thus relieving the government of liability for the fees and expenses claimed by the provisions of EAJA.

In his decision denying the application for an EAJA award, the law judge gave a summary of the case which is useful for discussion purposes:

> In the instant case there is no dispute that an allision did occur between the barge under the control of the respondent and the anchored M/V CENTAURO at the time, date and place asserted in each of the three specifications. Nor is there any dispute that respondent was serving under authority of his operator's license issued by the Coast Guard when the allision took place. Thus, the Investigating Officer successfully invoked the presumption of negligence described in DUNCAN. The respondent's defense, however, rests on the language of that case which states that even in the presence of the presumption a respondent is not required to establish a lack of negligence but rather that he exercised due care under the circumstances. If that is showned, the Investigating Officer must show that some standard of care existed which governed respondent's conduct and that it was breached." Decision and Order at 3-4.

The law Judge concluded that "testimony as a whole did not establish that [Appellant] failed to exercise due care under the circumstances, the test specifically described in Commandant's Appeal Decision 2211 (DUNCAN)." EAJA Decision and Order at 4.

OPINION

I

While the underlying facts in this case are not fairly in dispute, the application of the EAJA standard for award of fees and expenses has led to the lodging of this appeal.

An award pursuant to EAJA is mandated when an agency fails to prevail in an adversary adjudication unless the hearing officer or Administrative Law Judge determines that special circumstances render an award unjust, or the position of the agency "as a party to the proceeding was substantially justified." 5 U.S.C.

504(a)(1). In 46 CFR 6.5(a), the Department of Transportation acknowledged the applicability of EAJA to R.S. 4450 proceedings. The regulations also establish that "[t] he burden of proof that an award should not be made to an eligible prevailing applicant is on the Department of Transportation, where it has initiated the proceeding or on the appropriate operating administration such as Coast Guard, whose representative shall be called `operating administration counsel. `The Department of Transportation or operating administration may avoid an award by showing that its position was reasonable in law and fact. 49 CFR 6.9."

This burden on the government was intentionally imposed by Congress. See H.R. Rep. No. 96-1418, 96th Cong., 2d Sess. at 18, reprinted in [1980] U.S. Code Cong. and Ad. News 4953, 4971. According to the Judiciary Committee Reports of the Senate and the House of Representatives, the "substantially justified" standard represents a compromise between the dual standards under the Civil Rights Acts as articulated in Newman v. Piggie Park, 390 U.S. 400 (1968) (prevailing plaintiff should ordinarily recover attorney fees), and Christianburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412, 421 (1978) (prevailing defendant should recover fees only upon a finding that plaintiff's action was frivolous, unreasonable or without foundation). The Senate Report points out that the Piggie Park standard was rejected because of its potential "chilling effect on reasonable government enforcement effects." S. Rep. No. 96-253, 96th Cong. 1st Sess. (1979) to accompany S. 265, at 6. The Christianburg Garment standard, although urged on Congress by the Department of Justice, was rejected as inadequate because "it simply would not overcome the strong disincentives to the exercise of legal rights which now exist in litigation with the government." Id.

Congress has characterized the standard as one of reasonableness:

> The test of whether or not a government action is substantially justified is essentially one of reasonableness. Where the government can show that its case had a reasonable basis both in law and fact, no award will be made.

S. Rep. No. 96-253, supra, at 6; H.R. Rep. No. 96-1418, supra, at 10. Moreover, both Committees emphasize that:

> The standard, however, should not be read to raise a presumption that the government position was not substantially justified, simply because it lost the case. Nor, in fact, does the standard require the government to establish that its decision to litigate was based on a substantial probability of prevailing.

S. Rep. No. 96-253, supra, at 7; H.R. Rep. No. 1418, supra, at II.

According to the legislative history of the Act, the language "substantially justified" was adopted from the standard in Rule 37, FED. R. CIV. P. S. Rep. No. 96-253, supra, at 21; H.R. Rep. supra, at 18. The Senate Report expressly refers to the notes of the Advisory Committee on Civil Rules concerning the 1970 amendments to Rule 37(a)(4), FED. R. CIV. P.

Rule 37(a)(4), FED. R. CIV. P. provides that reasonable expenses, including attorney's fees, shall be awarded to the prevailing party on a motion for an order compelling discovery unless the court finds that the position of the losing party was "substantially justified." The standard was characterized by the Advisory Committee's notes on the Rule, as follows:

> On many occasions, to be sure, the dispute over discovery between the parties is genuine, though ultimately resolved one way or the other by the court. In such cases, the losing party is substantially justified in carrying the matter to court. But the rules should deter the abuse implicit in carrying or forcing a discovery dispute to court when no genuine dispute exists. And the potential or actual imposition of expenses is virtually the sole formal sanction in the rules to deter a party from pressing to a court hearing frivolous requests for or objections to discovery.

48 F.R.D. at 540 (emphasis supplied). Thus according to the Advisory Committee, Rule 37(a)(4) contemplates an award only where "no genuine dispute exists.

A brief survey of recent cases[1] arising under Rule 37(a)(4),FED. R. CIV. P. reinforces the notion that fees are not awarded absent "captious or frivolous conduct." Baxter Travenol Laboratories Inc. v. Lemay, 89 F.R.D.410 (S.D. Ohio 1981); an "indefensible" position (where the losing party had conceded the relevance of the documents withheld and that no privilege existed, and had failed to show that the requests were overly burdensome), Persson v. Faestel Investments, Inc., 88 F.R.D. 668 (N.D.Ill. 1980); or failure to answer, object to or request additional time in response to discovery request, Shenker v. Sprotelli, 83 F.R.D. 365 (E.D. Pa. 1979); Addington v. Mid-American Lines, 77 F.R.D. 750

[1] According to the Advisory Committee's Note, 48 F.R.D. 487, 538-40, a 1970 amendment shifted the burden of persuasion to avoid a fee award to the losing party. Thus, in examining the Rule 37, FED. R. CIV. P. "substantially justified" standard, it is important to distinguish between pre-and post-1970 decisions.

(W.D. Mo. 1978). The standards applied to Rule 37(a)(4) have been "reasonableness," SCM Society Commercial S. P. A. v. Industrial and Commercial Research Corp., 72 F.R.D. 110 (D. Tex. 1976) or "good faith," Technical, Inc. v. Digital Equipment Corp., 62 F.R.D 91 (N. S. Ill. 1973).

Thus, by expressly adopting the Rule 37(a)(4), F.R.D. R. CIV. P. standards in the Act, Congress has indicated its intent that fees should not be awarded against the government unless the government's is found to be unreasonable or the government has used or defended in a situation where no genuine disputes exists. Support for this position emerges as well from reported cases dealing with EAJA awards. The reasonableness test was specifically adopted in Alspach v. District Director of Internal Revenue, 527 F. Supp. 225, 229 (D.MD 1981).

II

In Evaluating the reasonableness or substantial justification for the action taken by the operating administration counsel in this case it must be borne in mind that a presumption of negligence was successfully raised by the Coast Guard's case in chief. Decision and Order on the merits at II. Such a presumption, when raised, is proof against a motion to dismiss. Decisions on Appeal Nos. 2279 (LEWIS) and 2034 (BUFFINGTON) aff'd BTSB Order EM-57. Although the Administrative Law Judge reserved ruling on Appellant's motion for dismissal after the government's case, such action has the practical effect of a denial of the motion which requires the party charge to proceed with his own case in chief. The only significance to Appellant of the reservation of the ruling was that it relieved him of the necessity of renewing the motion at the completion of his own evidence.

A ruling by the finder of fact after the presentation of all the evidence by both parties to an R.S. 4450 hearing is without question a resolution of the case on the merits. It is not helpful to elaborate on the significance of a motion to dismiss at such a point in the proceeding, since the law Judge must weigh and consider all the evidence adduce in any event. The government's case is subject to a less stringent level of proof if a motion to dismiss is ruled on before evidence is presented by a respondent since certain rules favor the party not making the motion to dismiss. However, if the government's case survives that motion, and it is renewed after both parties have rested, the law Judge must render a decision under the higher standard of proof set forth in 46 CFR 5.20-95(b). It is manifest from the Decision and Order on the merits that the law Judge evaluated the evidence in light of the regulatory burden on the government and rendered a decision on the merits, although procedurally it may appear that he was ruling

on the motion to dismiss. See Decision and Order on the merits at 12-6. The law Judge's evaluation is appropriate in light of the committee reports on EAJA which both states:

A court should look closely at cases, for example, where there has been a judgement on the pleadings or where there is a directed verdict or where a prior suit on the same claim has been dismissed. Such cases clearly raise the possibility that the government was unreasonable in pursuing the litigation.

S. Rep. No. 96-253, supra, at 6-7; J.R. Rep. No. 1418, supra, at II.

Although I have carefully considered the actions of the law Judge, I find that no presumption in favor of an award arises as a result of his action in "dismissing" the charges.

III

It was not the intent of Congress that EAJA should cause second guessing of the outcome of an administrative proceeding to determine the availability of an award to a prevailing party. Yet to determine the reasonableness or substantial justification for the government's action, some review of the proceeding is necessary. By express statement, however Congress acknowledge that mere failure to prevail on the part of the government does not trigger the award provisions of EAJA. Further, I am convinced that the remedial safety goals inherent in R.S. 4450 proceedings are of significance when considering the substantial justification for the government's action.

Herein, it is undisputed that the operator of a flotilla lost control over a barge entrusted to his care and that an allision resulted. The circumstances attending this occurrence included the admitted lack of effective communication between the responsible operator (Appellant), and the men handling the towing gear. The procedure employed by Appellant allowed the barge to be unsecured for a period of time during which the towing hawser was being made up to the towing bitt on the tug MARIE SWANN.

In the view of the Investigating Officer, the operator was legally responsible for the safe navigation and control of his flotilla. This view finds support in both the traditions of the maritime industry and in law. See Appeal Decisions Nos. 2264 (McKNIGHT), 2259 (ROGERS) and 1755 (RYAN). Although the lack of a communications system was not intrinsically Appellant's fault, it was within his knowledge, and the Investigating Officer could quite rightly assert that Appellant was negligent in not taking steps to

cope with the existing situation. Such steps need not have taken the form of installed equipment which might be solely within the competence of the owner.

Appellant's practice of failing to connect the towing hawser prior to release of the breast lines is not proof against a charge of negligence merely because it had succeeded in the past. The Administrative Law Judge expressed his skepticism with regard to this practice, and I agree with his view on this. Decision and Order of 4 June 1982 at 16. Under the existing conditions, the law Judge determined there was a failure of proof of negligence on this point. While I do not take issue with that decision, I do note that Appellant's evidence might have been regarded insufficient to rebut the Investigating Officer's case by a different trier of fact. From that I conclude that the Investigating Officer had a substantial likelihood of prevailing in this case, even if he had full knowledge of the testimony that would be offered to refute the presumption. The remedial safety purpose underlying these proceedings would be poorly served if the economic pressure inherent in EAJA was utilized to prevent such a close case from being heard. Rebuttal of a presumption is a difficult area of law and fact, and the apparent belief of the Investigating Officer that his case could survive the evidence of Appellant was not unreasonable on the facts of this case.

ORDER

The order of the Administrative Law Judge denying Appellant's Application for Attorney's Fees and Expenses, dated at Norfolk, Virginia on 30 June 1982, is AFFIRMED.

J. S. GRACEY
Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D.C., this 12th day of April 1983.